IN THE

Supreme Court of the United States

October Term, 1972.

No. 72-851.

THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known as THE ONEIDA NATION OF NEW YORK, also known as THE ONEIDA INDIANS OF NEW YORK, and THE ONEIDA INDIAN NATION OF WISCONSIN, also known as THE ONEIDA TRIBE OF INDIANS OF WISCONSIN, Inc.,

Petitioners,

v.

THE COUNTY OF ONEIDA, NEW YORK, and THE COUNTY OF MADISON, NEW YORK,

Respondents.

Brief of the Respondent, County of Madison.

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Petitioners,

v.

The County of Oneida, New York, and The County of Madison, New York,

Respondents.

Brief of the Respondent, County of Madison.

I. ARGUMENT.

A. Introduction.

The petitioners aver that in 1795 a treaty was executed by the petitioners' forefathers and the State of New York, the respondent's predecessors in title, for approximately 100,000 acres of land owned by the petitioners' ancestors since the world was made and deeded to the State of New York.

The petitioners claim their progenitors were beguiled into transferring the title of the land, and, therefore, the deed to the State of New York violated certain treaty obligations of the United States and of the Indian Nonintercourse Act of 1790.[1]

(1) Statute 137 (1790), now 25 U.S.C., Section 177 (1964).

(152-D)

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THE COUNTY OF ONEIDA, NEW YORK, and THE COUNTY OF MADISON, NEW YORK,

Respondents.

BRIEF OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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IN THE

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BRIEF OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Interest of *Amicus Curiae*

This *amicus curiae* brief by the Attorney General of the State of New York, is submitted by the State in support of the respondents herein. The State is concerned in this action for two reasons: One, the premises involved in this

action were granted to the People of the State of New York along with other lands by the petitioners by deed made in 1795 and the complaint attacks the validity of this deed. If this deed is not valid it would affect other lands now or formerly owned by the State of New York; Two, the lands involved are used by the respondents for public purposes which benefit all the People of the State of New York.

Facts

The petitioners commenced this action by filing a summons and complaint in the United States District Court for the Northern District of New York. The summons was filed February 11, 1970 and the complaint on February 5, 1970. An amended complaint was filed July 29, 1970 (1-2).[1]

The instant suit was brought by the Oneida Indian Nation of New York and the Oneida Indian Nation of Wisconsin against the Counties of Oneida and Madison, New York for damages in the amount of $10,000, in the form of rent for land used by the counties for building roads and other public improvements. The lands had been deeded to New York State by the Indians and later acquired by the counties. The Oneida Indian Nation of Wisconsin apparently was joined as a plaintiff as basis for jurisdiction on the ground of diversity of citizenship.

The basic claim in the complaint was that in 1795 in violation of the Indian Non-Intercourse Act of 1790, a sale of lands was made by the plaintiffs to the State of New York when no United States Commissioner was present. The complaint alleges that the payment for said lands in that sale was less than that which was being paid for

[1] Page references are to petitioners' Appendix.

similar lands (7-8). The complaint demanded "judgment against defendants in the sum of at least TEN THOUSAND DOLLARS ($10,000.00), plus such other and further monetary damages as the Court may deem just." (p. 9010). An amended complaint was filed pursuant to an order granted by United States District Court Judge PORT, dated December 28, 1971.

The amended complaint contained a new paragraph which read as follows (23):

> "22. Subsequent to the 'Treaty' of 1795, part of the premises purportedly deeded to the State and others became occupied by and recorded in the name of the Counties of Oneida and Madison, New York, the defendants herein. The defendants currently occupy parts of said premises for buildings, roads, and other public improvements. By reason of such use and occupancy of plaintiffs' premises, defendants for the period January 1, 1968 through December 31, 1969 became indebted to plaintiffs for the fair rental value of such premises to the extent of at least $10,000.00, exclusive of costs and interest."

The demand in the amended complaint was the same as that in the complaint (23).

Paragraphs 5 and 6 of the complaint allege Title 25 U. S. C. A. § 177 to be the same as Indian Non-Intercourse Act of 1790 (1 Stat. 137) (5-6). The ban on sales of Indian land in the 1790 Act reads as follows:

> "SEC. 4. *And be it enacted and declared,* That no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, *or to any state, whether having the right of pre-emption to such lands or not,* unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." (Emphasis supplied.)

The inclusion of the words "any state whether having the right of pre-emption to such lands or not" would include the original thirteen states which had the right of pre-emption to Indian lands as successor to the Crown of England.

At the time of the sale of lands involved herein, the 1790 Act was not the law. The Indian Non-Intercourse Act of 1793 (1 Stat. 329) was in effect. The Act of 1793 omitted the reference to "any state, whether having the right of pre-emption to such lands or not". These words were excluded from all subsequent amendments and from the present 25 U. S. C. A. § 177 (Indian Non-Intercourse Act). The omission of the pre-emption states from these Acts would indicate an intent to exclude them from the ban on sales of Indian lands without the presence of a United States Commissioner. Thus, New York State is not included under the 1793 Act in the ban against Indian sales without the presence of a Commissioner. This law read as follows (1 Stat. 329):

> "SEC. 8. *And be in further enacted*, That no purchase or grant of lands, or of any title or claims thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution; and it shall be a misdemeanor, in any person not employed under the authority of the United States, in negociating such treaty or convention, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months, directly or indirectly to treat with any such Indians, nation or tribe of Indians, for the title or purchase of any lands by them held, or claimed: *Provided nevertheless*, That it shall be lawful for the agent or agents of any state, who may be present at any treaty, held with Indians under the authority of the United States,

in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made for their claims to lands within such state, which shall be extinguished by the treaty."

The respondents moved to dismiss the complaint, by motion filed November 12, 1970, on the following grounds (24-26):

"1. The Court has no jurisdiction. Section 52 of the County Law states that the place of trial, when the County is a defendant, shall be in the county against which the action was brought. Further, the Court does not have jurisdiction of the subject matter on the ground of the diversity of citizenship, since one of the parties, plaintiff, The Oneida Indian Nation of New York State, are citizens of the same state as the defendants, County of Oneida and County of Madison.

2. The Complaint fails to set forth a cause of action. [24]

3. It appears on the face of the plaintiffs' Complaint, a copy of which is attached hereto and marked Exhibit 'A', that the claim asserted did not accrue, if in fact, it accrued at all, to the plaintiff within six years before the initiation of this action and, therefore, the action is barred by the statute of limitations.

4. The prolongation of the institution of the within suit by the plaintiffs is barred by laches.

5. The current owners of the land alleged to be withheld illegally from the plaintiffs have been held by their present occupants and their predecessors in title by adverse possession for over 150 years.

6. The defendant, County of Madison, as a bonafide purchaser for value of said premises without notices as to any alleged fraud involved in the purchase thereof from the plaintiffs and, therefore, is not a proper party in this action.

7. The plaintiffs' have not exhausted all of their remedies, since they presently have an identical claim

pending against the United States of America before the Federal Indian Claims Commission.

8. Chapter 70 of the Laws of 1806 created the County of Madison, which originally was part of the County of Chenango. Section 8 of the Court of Claims Act became law in 1920 by chapter 922. That section stated that the State waived immunity from liability in an action and henceforward would assume liability and consented to have the same determined in accordance with the same rules and laws as applied to actions in the Supreme Court against individuals and corporations. The cause of action in the instant case arose many years before Section 8 of the Court of Claims Ac tbecame law. [25]

9. There is no enabling act which permits the within plaintiffs' to institute the cause of action alleged in the plaintiffs' Complaint.

10. The controversy alleged in the Complaint actually would be against the United States of America, and/or the State of New York and not the County of Madison, since the County of Madison was not created until 1806, which date is subsequent to the alleged depravation of land owned by the plaintiffs' forebearers.

11. And for such other and further relief as to this Court may seem just and proper."

The petitioners (plaintiffs in the action) cross-moved for leave to file an amended complaint, which motion as noted above, was granted on December 4, 1970 (57).[2] The amended complaint was dismissed by Judge PORT on November 11, 1971 (107), judgment was filed the same date and the matter was appealed to the United States Court of Appeals, Second Circuit (94). The Court of Appeals rendered a judgment against the petitioners on June 12, 1972, a motion for rehearing denied September 11, 1972. Petitioners applied for certiorari which was granted by this Court on June 4, 1973 (108).

[2] The amended complaint included paragraph 22 hereinbefore set forth and no other change.

The Decision Below

(Reported: 464 F. 2d, 916-925)

In deciding for the respondents herein, the Court below held:

1. That 28 U. S. C. A. 1362 was enacted solely for the purpose of removing any jurisdictional amount required in civil actions brought by Indians in the Federal courts where the controversy arose under the Constitution, Laws or Treaties of the United States.

2. The allegation that a deed was secured by the State for the cession of Indian lands, which deed did not comply with the Indian Non-Intercourse Act, in and of itself did not establish the existence of a Federal question.

3. In determining whether there was a Federal question, only those facts which would appear in a "well-pleaded" complaint could be considered (pp. 919-920).

4. Allegations by an Indian tribe in a complaint to the effect that cession of their lands had been secured without the presence or approval of a Federal Commissioner in violation of the Indian Non-Intercourse Act and a claim for damages based on rental value was basically an action in ejectment and subject to dismissal for want of Federal jurisdiction under the "well-pleaded" complaint rule.

5. A complaint in an ejectment action does not present a Federal question even though the plaintiff claims right or title under a Federal statute or treaty.

6. The purpose of the rule governing pleading was to make complaints simpler (pp. 920-921).

7. Jurisdiction in the instant case could not be sustained in the Federal courts based on a New York statute per-

mitting an action to remove a cloud on title by a person not in possession when such rule does not exist in the Federal courts.

8. Federal courts may not apply State statutes broadening State equity jurisdiction that did not exist at the time of the adoption of the Constitution (pp. 921-922).

9. The Oneida Indian Nation of New York State was not a citizen of a State different from New York for the purpose of securing Federal jurisdiction under 28 U. S. C. A. 1332(a).

10. The addition of the Oneida Indian Nation of Wisconsin as a plaintiff, although it might be considered a citizen of Wisconsin, did not confer Federal jurisdiction under 28 U. S. C. A. 1332(a) since there must be complete diversity of citizenship under this section for there to be Federal jurisdiction (pp. 922-923).

11. A county is not a person within the meaning of Civil Rights statutes (pp. 923-924).

Summary of Argument

I. The petitioners in this action seek damages for lands occupied by the respondents for buildings, roads and other public purposes. The lands in question were in 1793 part of the Oneida Reservation and the State of New York as successor to the Crown of England had the original pre-emption right to these lands. It exercised its pre-emption to them in 1795 when it secured a deed to the lands from the Oneida Indians, which deed conveyed to the State of New York any interest that the Oneida Indians had to the occupation of these lands.

II. The Indian Non-Intercourse Act was first passed in 1790 and it included bans on sales of Indian lands to

any person or persons or to any state whether having the right of pre-emption to such lands or not without a United States Commissioner being present at the time of the negotitation for the lands. The Non-Intercourse Act was amended in 1793 by omitting the portion of the 1790 act underlined in the preceding sentence, and therefore should be interpreted as not covering those states such as New York which had acquired the Indian pre-emption rights as successors to the Crown of England.

III. New York State adopted this interpretation of the Indian Non-Intercourse Act after the amendment of 1793 and ever since has not required a Federal Commissioner to be present when it acquired land from New York State Indians. During the years thereafter, many conveyances were made by Indian tribes residing in New York of portions of their lands to the State of New York. The Federal government and the Indians for close to two hundred years acquiesced in this interpretation by New York State. An interpretation made at or about the time a law was enacted should be given great weight, especially when any modification or change in the interpretation would result in invalidating titles to land claimed through a chain of title of close to two hundred years.

IV. The Eleventh Amendment to the United States Constitution is a bar to actions being brought against a county which is a subdivision of the State when the action involves land for highway and other public purposes, because such purposes are deemed to be for the benefit of and in trust for all The People of the State of New York under New York law.

V. Sections 28 U. S. C. A. 1331(a) and 28 U. S. C. A. 1362 are two Federal jurisdictional statutes which are *in pari materia*. The phrase "arising under the Constitution,

laws or treaties of the United States", which appears in both sections, should be interpreted in the same manner. 28 U. S. C. A. 1362 should not be interpreted so as to disregard the inhibiting effect of the "well-pleaded complaint" rule since the courts when interpreting 28 U. S. C. A. 1331 (a) have applied the "well-pleaded complaint" rule and since the legislative reports[3] indicates that the sole purpose of enacting Section 1362 was to give the Indians the right to sue in the Federal courts when the amount involved was less than the jurisdictional amount of $10,000 required under 28 U. S. C. A. 1331(a). Under the "well-pleaded complaint" rule, the courts should disregard, as the Court below held, references to Indian treaties and laws which are set up in anticipation of defenses and unnecessary in the present complaint to secure the relief sought.

VI. The Court below was correct when it held that the instant action, which sought damages for occupancy of lands by respondents for two years (1968 and 1969) was dependent upon petitioners' right to possession of those lands and therefore basically an ejectment action.

VII. New York State Indian Law §§ 5 and 11(a) give the Indians and Indian nations a right to sue in State courts. This right is not limited by the provisions of 25 U. S. C. A. 233. Although 25 U. S. C. A. 233 contains a limitation as to Indian actions which accrued prior to September 13, 1952, the New York State laws contain no such limitation. This Court has recognized the jurisdiction of New York State courts in actions brought by an Indian nation where there was a New York State statute granting the Indians capacity to sue. See *Seneca Nations* v. *Christy*, 162 U. S. 283 (1896).

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[3] See appendix to this brief.

VIII. Even if there were concurrent jurisdiction in both Federal and State courts in the instant case, the Federal courts should apply the doctrine of abstention because an interpretation of the New York State Statute of Limitations is involved and the New York courts should be given an opportunity to make this interpretation.

POINT I

The construction of the Indian Non-Intercourse Act by New York State for close to two hundred years, acquiesced in by both the Federal government and the Indians, should not be changed especially where change would result in an economic upheaval.

Petitioners' contention, that under the Indian Non-Intercourse Act the State of New York was obliged to act in the presence of, and with the consent of, a United States Commissioner before a cession or sale of Indian lands to the State could have been made, is incorrect.

It is our position that New York State and the other twelve original states were not meant to be included in the Indian Non-Intercourse Act ban. This ban on sales by Indians without the consent of a United States Commissioner we submit, applied only to private purchasers, and those States created from United States Territories. This construction has been followed by New York State for close to two hundred years.

The Non-Intercourse Act as first enacted in 1790 (1 Stat. 137) included New York State. The following language in the Act indicates this:

> "* * * no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state,

> whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States."

The section refers to states having the pre-emption right. The pre-emption right was the first right of acquisition of the Indian's interest in the reservation lands. New York State had the pre-emption right to the Oneida lands and, therefore, was included in the ban of sales by the Oneidas without Federal consent.

However, the 1790 Statute was not the law when the transaction in 1795 between the Oneida Indians and the agents of the State of New York involving the lands in this complaint was made. The 1793 Act (1 Stat. 329) was in effect and that omits the words. It reads in part as follows:

> "• • • That no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution; • • •."

The omission from this latter act of the words "any state having the right of pre-emption to such lands or not", would exclude the original thirteen states from the ban in the Non-Intercourse Act.

United States v. *Franklin County,* 50 F. Supp. 152 (Dist. Ct., N. D. N. Y., 1943), so held when it was construing an 1802 act which was basically the same as the 1793 Act (pp. 155, 156):

> "The history of the Act of 1802 and preceding legislation is indicative of an intent to exempt a state 'having the right of pre-emption' from the provisions thereof. The first Indian Intercourse Act of 1790 in-

validated by its language the sale of lands within the United States to any person or persons, 'or to any state, whether having the right of pre-emption or not.' The clause quoted was omitted from the Act of 1802 and from the preceding Acts of 1796 and 1799. The omission is significant when viewed in the light of the practical construction given to the Act by both the State of New York and the United States."

* * *

"To require the presence and approbation of a United States Commissioner at a treaty or transaction where the State has the exclusive right to deal with the matter concerned would appear to result in a conflict of legal rights. The evidence shows that the existence of such requirement was not recognized either by the State of New York or by the United States.

The Act, by its terms, does not require the presence of a United States Commissioner at a treaty as a prerequisite to its validity, but gives an agent of a state the lawful right to negotiate with the Indians under given conditions. It is at most regulatory, designed to prevent fraud. Here no fraud is charged.

The conclusion is reached that the conveyance of 1824 by the St. Regis Indians to the State of New York is valid and that the provisions of the Act of 1802 does not apply thereto.

The judgment dismissing the complaint might be placed upon the lack of evidence to show the invalidity of the leases of 1817 and the conveyance of 1824, but in arriving at the conclusion the following quotation taken from *Seneca Nation of Indians* v. *Christie,* 126 N. Y. 122, at page 147, 27 N. E. 275, at page 282, seems to be especially pertinent: '* * * In view of the numerous Indian titles in this state originating in treaties by the state, or in purchases made with its sanction by individuals, we prefer to place our judgment on the broader ground, which will remove any cloud upon the validity of those titles. * * *' "

There existed a unique relationship between the original thirteen states and Indians living on reservations in those states. As successor to the Crown of England title to the lands was in the States. The Indians only had a right of occupancy as the Courts have held.

United States v. *Franklin County*, 50 F. Supp. 152, *supra*, citing *Johnson & Graham's Lessee* v. *McIntosh*, 21 U. S. 543 (1823) stated the following (p. 155):

> "[2] The right of the Indians in so-called 'tribal lands' was one of occupancy only; the fee of the lands remained in the sovereign which in the instant case was the State of New York. *Johnson* v. *McIntosh*, 8 Wheat. 543, 5 L. Ed. 681."

Chief Justice MARSHALL had said in *Johnson & Graham's Lessee, supra* (p. 589):

> "The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually, they are incorporated with the victorious nation, and become subjects or citizens of the government with which they are connected."

And continuing at pages 591-592:

> "However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others.

> However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of Justice."

It is because of this particular relationship that the distinction was made by Congress between the original States having the right of pre-emption and other persons or States, omitting from the 1793 Act the ban on sales by Indians without the presence of the United States Commissioner, as to the "pre-emption" States.

As stated, the Indians did not have title to the lands but only a right of occupancy. It has been held by this Court that the right of occupancy was not a compensable right. In *Tee-Hit-Ton Indians* v. *United States,* 348 U. S. 272 (1955), this Court said (p. 279):

> "It is well settled that in all the States of the Union the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or permission from the whites to occupy. That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised 'sovereignty,' as we use that term. This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians."

United States as Guardian, etc. v. *Santa Fé Pacific R. Co.,* 314 U. S. 339 (1941) was an action brought on behalf

of the Walapai[4] Indians to compensate them for lands taken from them. In 1881, the Walapais had applied to the President of the United States for an Executive Order setting aside a reservation for them, which was issued in 1883. The Santa Fé Pacific Railroad took certain lands from the Indians for railroad purposes. The Indians had only a right of occupancy as to some of the lands taken and the balance was in the reservation which had been set aside for them by the United States.[5] In that case, this Court held that, as to the land in the reservation, the Indians were entitled to compensation, but not as to the land to which they had a mere right of occupancy, saying (357-358):

> "The Executive Order creating the Walapai Indian Reservation was signed by President Arthur on January 4, 1883. There was an indication that the Indians were satisfied with the proposed reservation. A few of them thereafter lived on the reservation; many of them did not.
>
> * * *
>
> "[I]n view of all of the circumstances, we conclude that its creation at the request of the Walapais and its acceptance by them amounted to a relinquishment of any tribal claims to lands which they might have had outside that reservation and that that relinquishment was tantamount to an extinguishment by 'voluntary cession' within the meaning of § 2 of the Act of July 27, 1866. The lands were fast being populated. The Walapais saw their old domain being pre-empted. They wanted a reservation while there was still time to get one. That solution had long seemed desirable in view of recurring tensions between the settlers and the Walapais. In view of the long standing attempt to settle the Walapais' problem by placing them on a

[4] Sometimes called Hualapai Indians.

[5] This is to be distinguished from the instant case where there was no grant of a reservation by United States to petitioners.

> reservation, *their acceptance of this reservation must be regarded in law as the equivalent of a release of any tribal rights which they may have had in lands outside the reservation.*" (Emphasis supplied.)

Here, too, the lands in question were not used by the Oneidas for close to two hundred years and this must be regarded as the equivalent to a release of any tribal rights.

As a matter of fact, chapter 185 of the New York Laws of 1843 was a statute enacted for the sale of lands of some Oneida Indians who were leaving New York State and to provide compensation for the lands sold. This law contained the following:

> "§ 1. The Oneida Indians owning lands in the counties of Oneida and Madison, are hereby authorized to hold their lands in severalty, in conformity to the surveys, partitions and schedules annexed to and accompanying the treaties made with the said Indians, by the people of this state, in the year one thousand eight hundred and forty-two, and now on file in the office of the secretary of state; *and the lots so partitioned and designated by said survey to the said Indains shall be deemed to be in lieu of all claims and interest of the said Indians, in and to all other lands and property in the Oneida Reservation, except the mission lot on lot one, and the church lot on lot two, of the Oneida Purchase, of May 23d, 1842, which are to be held by the said Indians as tenants in common.*" (Emphasis supplied.)

The emphasized portion of this section shows statutory intent that acceptance by the Indians of the proceeds of the sale was to be considered a release. The acquiescence by the Oneidas and Federal government in the transfer of the lands herein involved for almost two hundred years indicates an acceptance of this compensation.

In any event, construction of a statute during the course of close to two hundred years by the State and Federal

government must be given great weight. In *Udall, Secretary of the Interior* v. *Tallman, et al.*, 380 U. S. 1 (1964), at p. 16 of that opinion, this Court said:

> "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. 'To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' *Unemployment Comm'n* v. *Aragon*, 329 U. S. 143, 153. See also, *e.g.*, *Gray* v. *Powell*, 314 U. S. 402; *Universal Battery Co.* v. *United States*, 281 U. S. 580, 583. • • •"

This rule is very old. Chief Justice TANEY in *United States* v. *State Bank of North Carolina*, 31 U. S. 29 (1832), said (p. 30):

> "The construction of the law of the United States now claimed, has been that of universal practice since it was enacted. From 1797 down to the present period, it has been applied in favour of the United States to bonds not due, as well as to others to become due; and the estates of insolvents and intestates have been adjusted and settled on this principle in every section of the Union. This received construction will induce the Court to hesitate before it will adopt another; as it would open those long-established settlements, and would be productive of great difficulty and confusion."

CRAWFORD *on Statutory Construction* (1940) § 218, p. 388 states the rule as follows (388-389):

> "§ 218. CONTEMPORANEOUS CONSTRUCTION AND USAGE, GENERALLY.
>
> —Where the meaning of a statute is in doubt, the court may resort to contemporaneous construction—that is, the construction placed upon the statute by its contemporaries at the time of its enactment and soon there-

> after—for assistance in removing any doubt. Similarly, resort may also be had to the usage or course of conduct based upon a certain construction of the statute soon after its enactment and acquiesced in by the courts and the legislature for a long period of time. As is obvious, the meaning given to the language of a statute by its contemporaries is more likely to reveal its true meaning than a construction given by men of another day or generation. Even words change in meaning with the march of time. And the meaning given by contemporaries can be revealed with no more certainty than be resort to the common usage and practice under the statute itself over a considerable period of time."

The State of New York made many treaties with the Indians occupying lands within the State. An affidavit by Henry S. Manley, an authority on the subject, which was filed in *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885 (2d Cir.), cert. den. 358 U. S. 841 (1958), contained the following:

> "No treaty seems to have been entered into between the Indians and the State during the period the 1790 act was effective. A few months after it was replaced by the 1793 act New York resumed its accustomed course of dealing.
>
> "During the next fifty-two years it made at least thirty-nine treaties with various bands of New York Indians, all without any participation by the United States. Titles to very large and important tracts of the State are held under those treaties. New York departed from that practice on five occasions, all in the period 1797-1802, and for those five treaties availed itself of the procedure suggested by the proviso to the 1793 act."

Thus, the State of New York, with at least the tacit consent of the United States, has interpreted the amended Indian Non-Intercourse Act so as to negate the necessity of securing the consent of the United States. If this con-

struction should be wrong and title be held to be in the Indian nations, it would affect the titles to a great portion of the lands in western New York State and result in economic havoc.[6]

The New York Court of Appeals recognized this fact in *Seneca Nation* v. *Christy*, 126 N. Y. 122 (1891) at pp. 137-141:

> "The original states, before and after the adoption of the Federal Constitution, assumed the right of entering into treaties with the Indian tribes for the extinguishment and acquisition of their title to lands within their respective jurisdictions. They exercised the power, which had before been vested in the crown, to treat with the Indians, and this they did independently of the government of the United States. This was notably true of the state of New York. Laws were enacted from time to time by the legislature of the state, authorizing treaties with the Indians. (See Laws of 1784, ch. 22; Laws of 1788, ch. 47; Laws of 1813, ch. 29, § 52; Laws of 1839, ch. 58; Laws of 1831, ch 234.) In 1788, the state entered into treaties with the Onondagas and Oneidas, and in 1789 with the Cayugas, whereby it acquired the title to large tracts of land in the central part of the state, and many subsequent treaties were made with these tribes by which the state finally acquired nearly all their remaining lands. Similar treaties were made with the St. Regis, Mohawk and Seneca Indians. In all, more than thirty treaties were made between the state and various tribes, independently and without the intervention of the government of the United States. (See Collection of State Treaties, Assembly Document, 1889, in Report on Indian Problem). They were generally negotiated by commissioners appointed by the legislature, acting in conjunction with the governor of the state. It appears that on

[6] The Affidavit of Henry S. Manley, *supra*, filed in *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885, states that there were 39 treaties made by New York State with various tribes of Indians after the 1793 Act and in only five did the Commissioners of the United States participate.

two or three occasions a commissioner of the United States was present when treaties were made. But in all cases the state and not the United States was the contracting party with the Indians. The treaties were in no sense treaties made by the president and senate of the United States. The list of governors who participated in making them, embraces many of the great names in the history of the state. It includes the Clintons, Tompkins, Van Buren, Marcy, Wright, Seward. By virtue of these treaties this state entered upon the lands acquired thereby, and they have been sold and built upon and improved, and comprise some of the fairest and most prosperous districts of the state.

* * *

"It cannot, we suppose, be questioned that these treaties were constitutionally made in the exercise of the treaty-making power of the Federal Government, and became under the Constitution the supreme law. But the dealing by the general government with the Indian tribes through treaties was resorted to as a convenient mode of regulating Indian affairs, and not because, as with other nations, it was the only mode, independently of the arbitrament of war, of dealing with them.

* * *

"The practical construction given by the state of New York to the Federal Constitution, as shown by the numerous treaties made by it with the Indian tribes, and the recognition by the federal authority of their validity is very strong evidence that the clause in the Federal Constitution prohibiting the states from entering into treaties, does not preclude a state having the pre-emption right to Indian lands, from dealing with the Indian tribes directly, for the extinguishment of the Indian title. Such a dealing is not a treaty in the constitutional sense, and is not inconsistent with the exercise by the United States of its general jurisdiction for the protection of the Indians in their right of occupancy of their lands. The remark of Justice McLean, in his opinion in *Worcester* v. *State of Georgia* (6 Pet. 580), that 'Under the Constitution no

> state can enter into any treaty, and it is believed that since its adoption no state under its own authority has held a treaty with the Indians,' was true as referring to treaties for lands owned by the general government, but if intended to have a broader scope, seems opposed to the facts of history. The circumstance that Gov. George Clinton, in 1793, after the passage of the Indian Intercourse Act of that year, transmitted to Mr. Jefferson, then secretary of state of the United States, exemplified copies of the different treaties entered into by the state of New York with the various tribes of Indians within its boarders, which treaties congress formally approved, does not militate against the view that the right of the state to enter into those treaties was not prohibited by the Constitution. The treaties had gone into effect and had been executed, and the act of Governor Clinton was a prudential measure to remove any possible cloud upon the action of the state."

The interpretation of the Indian Non-Intercourse Act, by the State of New York for close to two hundred years which has been relied on by persons in accepting title to lands, should not be changed, especially in a situation which would upset land titles going back to the early 1800's and cause economic bedlam in all of the original states.

POINT II

Since the defendants are using the land in question for a State purpose for the benefit of all of the people of the State of New York, and thus are acting as agents of the State, the 11th Amendment of the U. S. Constitution is a bar to this cause of action being brought in the Federal courts.

Federal courts do not have jurisdiction of the defendants in this action since defendants are acting solely as agents of the State which has not consented to be sued in the Federal courts and which has immunity from suit in the Federal courts by reason of the 11th Amendment to the U. S. Constitution.

The 11th Amendment denies Federal jurisdiction in an action against a state when brought by citizens of another state or nation. This principle has been extended to suits brought against a state by its own citizens in the Federal courts. (See *Hans* v. *Louisiana* [1890], 134 U. S. 1.) This Court held in *Parden, et al.*, v. *Terminal Railway of the Alabama State Docks Department, et al.*, 377 U. S. 184 (1964), that an unconsenting state is immune from suit whether it be by its citizens or those of another state, the opinion saying (p. 186):

> "Although the Eleventh Amendment is not in terms applicable here, since petitioners are citizens of Alabama, this Court has recognized that an unconsenting State is immune from federal-court suits brought by its own citizens as well as by citizens of another State. *Hans* v. *Louisiana*, 134 U. S. 1; *Duhne* v. *New Jersey*, 251 U. S. 311; *Great Northern Life Ins. Co.* v. *Read*, 322 U. S. 47, 51; *Fitts* v. *McGhee*, 172 U. S. 516, 524. See also *Monaco* v. *Mississippi*, 292 U. S. 313. Nor is the State divested of its immunity 'on the mere ground that the case is one arising under the Constitution or laws of the United States.' *Hans* v. *Louisiana, supra*, 134 U. S., at 10; see *Duhne* v. *New Jersey, supra*, 251

U. S. 311; *Smith* v. *Reeves,* 178 U. S. 436, 447-449; *Ex parte New York,* 256 U. S. 490, 497-498."

The Oneida Nation of New York is a citizen of New York State and the Oneida Indian Nation of Wisconsin is a citizen of Wisconsin. Neither has the capacity to sue in the Federal courts where the defendant is an agency of the State acting for the State in a governmental capacity.

Counties in New York State as distinguished from other municipal corporations such as cities, villages and school districts, exist only as agents of the State performing public functions for the benefit of all. In the case of other New York municipal corporations, the incorporation is initiated usually by citizens rather than the New York State Legislature. In the case of counties, the New York State Legislature itself acts without a petition by citizens of New York and on its own initiative forms a county.

In *Matter of County of Cayuga* v. *McHugh,* 4 N Y 2d 609, the New York Court of Appeals described counties as follows (pp. 614-615):

"Counties, as civil divisions of a State, had their origin in England and were formed to aid the more convenient administration of government (*Markey* v. *County of Queens,* 154 N. Y. 675, 680). So it is today that counties are mere political subdivisions of the State, created by the State Legislature and possessing no power save that deputed to them by that body (*Village of Kenmore* v. *County of Erie,* 252 N. Y. 437, 441-442, *City of Tulsa* v. *Oklahoma Natural Gas Co.,* 4 F. 2d 399, 403, appeal dismissed 269 U. S. 527; 15 C. J., Counties, § 4, pp. 393-394). Insofar as political and governmental powers of a county (municipal corporation) are concerned, it is clear that the county is a mere agent of the State and as such is subject to the control of the Legislature (*County of Albany* v. *Hooker,* 204 N. Y. 1, 9-10; *Hunter* v. *Pittsburgh,* 207 U. S. 161, 178-179; *Williams* v. *Eggleston,* 170 U. S. 304, 310; 20 C. J. S., Counties, § 1, pp. 754-755)."

(See also McQuillen Mun. Corps. [3d ed.] § 2.46a; *Curtis* v. *Eide*, 19 A D 2d [N. Y.] 507 [1st Dept., 1963]).

When a subdivision of a state is sued, the nominal caption is not the determining factor of whether the 11th Amendment is a bar, but the nature of the action brought against the subdivisions is. *In re Ayers*, 123 U. S. 443 (1887), contained the following (p. 492):

> "It is, therefore, not conclusive of the principal question in this case, that the State of Virginia is not named as a party defendant. Whether it is the actual party, in the sense of the prohibition of the Constitution, must be determined by a consideration of the nature of the case as presented on the whole record."

(See also *Tardan* v. *Chevron Oil Co.*, 332 F. Supp. 304 [D. C., La., 1971]; *Dupont* v. *South Carolina Public Service Authority*, 100 F. Supp. 778 [D. C., S. C., 1951]; *Meyerhoffer* v. *East Hanover Tp. School District*, 280 F. Supp. 81 [D. C., Pa., 1968].)

The immunity exists even where the state agency is an autonomous entity (*DeLong Corporation* v. *Oregon State Highway Commission*, 233 F. Supp. 7 [D. C. Ore. 1964]).

In determining whether the transaction in question was ultimately attributable to the State, the Federal Courts will consult the decisions of the State courts (*Fleming* v. *Upper Dublin School District*, 141 F. Supp. 813 [D. C. Pa., 1956].

To the extent that a subdivision such as a county engages in governmental as opposed to proprietary activity, it acts as the agent of the state, performing state functions and enjoying state immunity. In *Graham* v. *Hamilton County, State of Tennessee*, 266 F. Supp. 623 (D. C., Tenn., 1967), a suit was brought by a citizen of Georgia against Hamilton

County, Tennessee. Graham claimed that the County built an entrance ramp for a highway depriving him of access to a necessary road. The ramp although built by the County was financed through Federal and state funds. In *Graham*, the Court noted that (p. 624):

> "However, for a State to take property for public use without just compensation would be a deprivation of due process of law and would violate both the Constitution of the United States (Amendment 14, Section 1) and the Constitution of the State of Tennessee (Article 1, Section 21). The Court is aware of no consent, statutory or otherwise, given by the State of Tennessee for itself or its political subdivisions to be sued in a foreign jurisdiction for damages for a taking under the power eminent domain."

It continued (p. 625):

> "However, 'the question whether a suit is within the prohibition of the eleventh amendment is not always determined by reference to the nominal parties on the record.' *In Re Ayers,* (1887) 123 U. S. 443, 8 S. Ct. 164, 31 L. Ed. 216; *Poindexter* v. *Greenhow*, (1885) 114 U. S. 270, 29 L. Ed. 185, 5 S. Ct. 903. This is an especially apt point in the instant situation, because of the somewhat peculiar rules of law in Tennessee relating to actions by landowners claiming a taking of property for highway purposes. It was made clear by the Supreme Court many years ago that the Eleventh Amendment test is one of substance and not of form."

And concluded (p. 626):

> "Accordingly, the Court is of the opinion that the State is the real party in interest in the present action, and is a 'party' in the sense of the Eleventh Amendment. This being so, the present action is not within the judicial power of the United States and thus not within the jurisdiction of this Court."

In *Markey* v. *County of Queens,* 154 N. Y. 675 [1898], the New York State Court of Appeals applied the doctrine of state immunity in favor of Queens County when the County was sued for personal injuries sustained by the plaintiff because of the County's alleged negligent maintenance of a bridge. In that case, the Court said (680-681):

> "By the common law of England, a county, though sometimes regarded as a *quasi* corporation, could not be subjected to a civil action for a breach of its corporate duty; unless such an action was expressly given by statute. The duty of maintaining and repairing bridges belonged to it; but the only remedy for a breach of that duty was by presentment or indictment. An unsafe condition of a highway, or a bridge as a part of the highway, was regarded as the subject of a popular action and not of a private action.
>
> • • •
>
> "The authority of that case, as settling the rule at common law that no civil action could be maintained for an individual injury, in consequence of the breach of a public duty on the part of the inhabitants of a county, has been repeatedly recognized in England and in this country.
>
> • • •
>
> "In this state its division into counties, or sections, for the purposes of local government was but a continuance of a method, which, while a colony, it had adopted from England. By the Constitution of the state, it was provided that such parts of the common law as formed the law of the colony of New York were retained as the law of the state. If under the common law counties could not be subjected to private actions, for the results of acts done in the performance of governmental duties, then it should follow that counties of this state could not become liable to such actions; unless the common law, in that respect, has been changed by statute."

(See also *City of Albany* v. *State of N. Y.*, 21 A D 2d [N. Y.] 224 [3rd Dept., 1964]; *United States* v. *Cattaraugus County*, 71 F. Supp. 413 [D. C. W. D. N. Y., 1947]).

Thus in New York State use of lands for highway purposes is a governmental purpose and an agency making such use is entitled to all governmental immunity available to the State in a like case. Federal courts have also applied the same rule as the New York State courts with respect to counties, the test on the question of 11th Amendment immunity, being this is the real party in interest (*United States* v. *Cattaraugus County*, 71 F. Supp. 420, *supra*).

The complaint in the instant case alleges "The defendants currently occupy parts of said premises for buildings, roads, and other public improvements" (9).

Such a use is governmental. It is as if the State itself were engaged in the use. Therefore, the counties are entitled to the same 11th Amendment immunity from action in the Federal courts as the State would have.

POINT III

Since this Court has held that the right to possession of real property is not a Federal question, even though Federal laws and treaties have been alleged by petitioners in anticipation of a defense, the complaint fails to state a Federal question and Federal courts do not have jurisdiction.

This Court should exercise the doctrine of abstention even if the complaint did state a Federal question, since recovery would depend on interpretation of New York statutory law and since the petitioners have capacity to sue in New York State Courts.

A. Under the "well-pleaded complaint" rule, despite the fact the the petitioners set up Federal law and treaties in the complaint in anticipation of respondents' pleading, there is no Federal question involved in the case.

The prime issue in this case is—Does a Federal question exist? To determine whether one exists, one must consider the "well-pleaded complaint" rule. This rule requires that only such allegations as are required by a proper pleading to secure the remedy sought may be considered (*Taylor* v. *Anderson,* 234 U. S. 74 [1914]). The plaintiff may not include in a complaint matters in reply to a defense which it anticipates and thereby create a Federal question (*Gold Washing and Water Co.* v. *Keys,* 96 U. S. 199 [1877]).

Petitioners here seek damages for rent for the period from January 1, 1968 to December 31, 1969 relying on *United States* v. *Forness,* 125 F. 2d 928 (2d Cir.), cert. den. 316 U. S. 694 (1942). The Court below stated (464 F. 2d 916, 920):

> "Although plaintiffs' only specific claims for relief are two years' rental value as a result of defendants'

> occupancy, or damages for denial of plaintiffs' right of use, see note 3 *supra*, their success depends upon establishment of their right to possession, see Wills v. McKinnon, 178 N. Y. 451, 70 N. E. 962 (1904); Crawford v. Town of Hamburg, 19 A. D. 2d 100, 241 N.Y.S.2d 357 (1963) and the action is thus basically in ejectment." (Appellants' Appendix A-19)

The gravamen of an action in ejectment is the right to possession. Since the complaint herein as the majority, in the Court below said, is "basically in ejectment" all that needed to be pleaded is the right to possession. The inclusion of the treaties and laws of the United States is superfluous. The Indian right of occupancy arose out of their being the original occupants of the land and not out of any United States treaties or laws. Pleading them thus can only be explained as an anticipation of a defense that they have lost the right of occupancy because of the conveyance of the land in 1795 by the petitioners to the State of New York. It is through this conveyance that the respondents claim. Thus, the pleading of these laws and treaties is in anticipation of a defense and not necessary for a "well pleaded complaint".

This Court so held in *Taylor* v. *Anderson*, 234 U.S. 74 (*supra*), which was an ejectment action brought by an Indian in the Federal court. There the complaint also pleaded the laws and treaties of the United States in anticipation of a defense. Federal relief was denied by this Court because it determined that there was no Federal question involved. In *Taylor*, this Court said (75-76):

> "It is now contended that these allegations showed that the case was one arising under the laws of the United States, namely, the acts restricting the alienation of Choctaw and Chickasaw allotments, and therefore brought it within the Circuit Court's jurisdiction. But the contention overlooks repeated decisions of this

court by which it has become firmly settled that whether a case is one arising under the Constitution or a law or treaty of the United States, in the sense of the jurisdictional statute (now § 24, Judicial Code), must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose. *Tennessee* v. *Union and Planters' Bank*, 152 U. S. 454, 460, 464; *Third Street Railway Co.* v. *Lewis*, 173 U.S. 457, 460; *Florida Central Railroad Co.* v. *Bell*, 176 U. S. 321, 329; *Boston &c. Mining Co.* v. *Montana Ore Co., supra; Joy* v. *St. Louis, supra; Devine* v. *Los Angeles*, 202 U.S. 313, 333; *Louisville & Nashville Railroad Co.* v. *Mottley*, 211 U. S. 149; *Shulthis* v. *McDougal*, 225 U. S. 561, 569; *Denver* v. *New York Trust Co.*, 229 U. S. 123, 133-135. Tested by this standard, as it must be, the case disclosed by the petition was not one arising under a law of the United States."

Petitioners also claim jurisdiction under 28 U. S. C. A. 1331(a), the "general Federal question jurisdiction" statute. It will be shown hereafter that there was no Federal question herein involved because of alleged violations of United States statutes and treaties in the "Indian jurisdiction" statute (28 U.S.C.A. 1362) because these laws, statutes and treaties were not necessary in a "well-pleaded complaint". For the same reason, such "general Federal questions" which were pleaded are also superfluous in a "well-pleaded complaint". Thus, if jurisdiction is absent under 28 U S. C. A. 1362, it certainly is absent *a fortiori* under 28 U. S. C. A. 1331(a).

B. The "well-pleaded complaint" rule is equally applicable to 28 U. S. C. A. 1331(a) and 28 U. S. C. A. 1362, and thus the complaint states no Federal question.

The dissenting opinion of Judge LUMBARD in the Court below and Judge MURRAY's opinion (cited by appellant, Br., p. 42) in *Salt River Prima-Maricopa Indian Community* v. *Arizona Sand and Rock Company, an Arizona Corporation; Salt River Valley Water Users' Association, an Arizona corporation, et al.* (No. Civ. 72-376 Phx., Arizona, Dec. 11, 1972) hold that the "well-pleaded complaint" rule is applicable only to cases in which the Federal jurisdiction is dependent on 28 U. S. C. A. 1331(a). That section reads as follows:

> "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum *or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.*" (Emphasis supplied)

Both Judge LUMBARD's and Judge MURRAY's opinions hold that the well "pleaded-complaint" rule is inapplicable to cases where jurisdiction is dependent on 28 U. S. C. A. 1362. That section reads as follows:

> "§ 1362. INDIAN TRIBES
>
> The district courts shall have original jurisdiction of all civil actions, brought by *any Indian tribe or band* with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy *arises under the Constitution, laws, or treaties of the United States* " (Emphasis supplied)

The wording of these two sections is identical except that one (§ 1331[a]) gives a right to sue in the Federal courts when the claim exceeds $10,000, and the other (§ 1362) when the party bringing the action is an Indian

tribe. It is a rule of statutory construction that earlier statutes are properly considered in the construction of later statutes dealing with the same subject (New York Statutes § 222) 82 C. J. S. (Statutes § 366 states the rule as follows (p. 801):

> "Statutes which relate to the same person or thing, or to the same class of persons or things, or which have a common purpose are in pari materia, and it is a general rule that in the construction of a particular statute, or in the interpretation of its provisions, all other statutes in pari materia should be read in connection with it, as together constituting one law, and they should be harmonized, if possible."

The section further states that all statutes relating to the same subject or all statutes having the same purpose are to be read in *pari materia* (82 C. J. S. [Statutes] § 366, pp. 803-804). *Crawford On Statutory Construction* 231, pp. 431-433 states:

> "§ 231. Statutes in Pari Materia.—Statutes in pari-materia, that is, those which relate to the same matter or subject, although some may be special and some general, in the event one of them is ambiguous or uncertain, are to be construed together, even if the various statutes have not been enacted simultaneously, and do not refer to each other expressly, and although some of them have been repealed or have expired, or held unconstitutional, or invalid. In this connection, however, the legislative intention must not be confounded with the power of the legislature to carry that intention into effect. To refuse to give force and validity to a law is one thing, and to refuse to read it is a very different thing. It is by a mere figure of speech that we say an unconstitutional statute is stricken out."

This Court has applied the *Pari Materia* rule in *Estate of Sanford* v. *Commissioner of Internal Revenue*, 308 U. S. 39 (1939) where it said (p. 44):

> "There is nothing in the language of the statute, and our attention has not been directed to anything in its legislative history to suggest that Congress had any purpose to tax gifts before the donor had fully parted with his interest in the property given, or that the test of the completeness of the taxed gift was to be any different from that to be applied in determining whether the donor has retained an interest such that it becomes subject to the estate tax upon its extinguishment at death. The gift was supplementary to the estate tax. The two are in *pari materia* and must be construed together. *Burnet* v. *Guggenheim, supra* [288 U. S. 280] 286."

See, also, Patent Appeal No. 5918, 195 F. 2d 303 (Court of Customs and Patent Appeals, 1952), cert. den. 344 U. S. 824, where the Court of Customs and Patents said at page 305:

> "In construing a statute a court may resort to other enactments in which Congress has defined the language in issue, or otherwise explained its meaning. Such definitions, while not binding on the court, are highly persuassive, particularly when such other enactments are substantially contemporaneous with the statute involved in the case at bar."

When Congress enacted 28 U. S. C. A. 1362 with also the exact purpose as section 1331(a), both being Federal Court jurisdiction acts, the use of the same words shows the obvious intent that both should be interpreted identically.

As a matter of fact, the legislative history of 28 U. S. C. 1362 unequivocally indicates the intent of Congress to change only the jurisdictional amount limitation in actions brought by Indians. The purpose of the act as stated in Senate report 1507 (1966) is:

"PURPOSE OF BILL

"The purpose of the bill as amended *is to permit Indian tribes to bring civil actions arising under the Constitution, treaties, and laws of the United States, without regard to the $10,000 limitation,* and accordingly amends chapter 85, title 28, United States Code, by adding a new section." (Emphasis supplied)

The House Report 2040 (1966) contains basically the same statement as to purpose.

The enactment appears to have been spurred by the result in *Yoder* v. *Assinbone* (339 F. 2d 360 [9th Cir., 1964] wherein Indians raised a Federal question but failed to satisfy the judicial tests of jurisdictional amount. Since Indian claims are frequently aggregates of many small injuries and frequently involve mineral rights of indeterminate value, the jurisdictional amount limitation was removed. The comments of the Congressional Committee and of the Justice Department clearly indicate that no further substantive change was intended. They conclude that few additional cases would be added to the Federal calendars by the elimination of only the $10,000 requirement.

The complete reports of the Judiciary Committees of both houses of Congress are appended hereto as Appendix in order to illustrate clearly the context in which the change was enacted.

Petitioners contend that 28 U. S. C. A. 1362 should be given broad interpretation because otherwise they would have no right to any relief. It has already been shown that they either have or had a right to relief in New York State courts. Their relief, however, if they have a good cause of action, is not limited to suit in the State courts against the defendants in this action, but also against the

United States before the Indian Claims Commission. The latter since it is Oneidas' contention here that the land cessions were in violation of treaties made between the Indians and the United States Government.

In *The Seneca Nation of Indians, The Tonawanda Band of Seneca Indians* v. *The United States,* 173 Ct. Cl. 917 (1965),[7] compensation was sought from the United States for damages suffered by the Indians by reason of the fact that the Federal Government failed to duly protect their land holdings; their land was sold to private purchasers. In that case the Court held there could be a claim against the United States for such land sales and sent it back to the Indian Commission to determine whether there were any damages.

If the sales or cessions to New York were in violation of the Indian Non-Intercourse Act, appellants are not without remedy but have a claim against the United States. As a matter of fact, the Court below stated that it was advised that the Oneidas had filed a claim with the Indian Claims Commission (25 U. S. C. A. § 78) because of the sale to the State of New York of lands involved in the complaint and have received an award but that the United States appealed this to the Court of Claims. If this award is affirmed by the United States Court of Claims and paid to the Indians, then a recovery here would be at least a partial duplication of damages.

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[7] It should be noted that the Court failed to reach the question of whether New York State was governed by the restrictions of the Indian Non-Intercourse Act, only holding that it was applicable to purchasers from the Indians by private parties. See also *The Six Nations, etc., et al.* v. *The United States,* 173 Ct. Cl. 899 (1965); *The Seneca Nations of Indians* v. *The United States,* 173 Ct. Cl. 912 (1963).

It follows therefore that there is no reason to negate the demonstrated Congressional intent and interpret the same words in 28 U. S. C. A. § 1331(a) and 28 U. S. C. A. § 1362 differently.

C. New York State under New York Indian Law, §§ 5 and 11a has granted Indians and Indian tribes the capacity to sue in the instant case. Therefore, as this Court held in *Seneca* v. *Christy*, the matter is one for the New York State courts.

Analogous to the situation here is that in *Seneca Nations* v. *Christy*, 162 U. S. 283 (1896). The *Seneca* case came up through the State courts and was appealed to this Court. The New York Court of Appeals had found for the defendant for two basic reasons.[8] First, because the Non-Intercourse Act[9] was not applicable to New York State and, second, because of time limitations. In *Seneca Nations* this Court dismissed the writ of error on the ground that there was no Federal question, saying (pp. 289-290):

> "The Seneca Nation availed itself of the act in bringing this action, which was subject to the provision, as held by the Court of Appeals, that it could only be brought and maintained 'in the same manner and within the same time as if brought by citizens of this State in relation to their private individual property and rights.' Under the circumstances, the fact that the plaintiff was an Indian tribe cannot make Federal questions of the correct construction of the act and the bar of the statute of limitations.
>
> As it appears that the decision of the Court of Appeals was rested, in addition to other grounds, upon

[8] 126 N. Y. 122 (1891).

[9] The 1802 Non-Intercourse Act which was similar to the 1793 one and omitted the ban without the presence of a U. S. Commissioner on sales by Indian nations to states having the right of pre-emption of Indian lands, was the one involved.

a distinct and independent ground, not involving any Federal question, and sufficient in itself to maintain the judgment, the writ of error falls within the well settled rule on that subject and cannot be maintained".[10]

In *Seneca*, this Court recognized the jurisdiction of New York courts in Indian matters where the State Legislature granted the Indians capacity to sue.[10]

In *Seneca* v. *Christy*, the Senecas right to sue in New York State was by virtue of chapter 150 of the Laws of the State of New York of 1845, which permitted them to bring their action in the State courts. Chapter 150 was limited to the Seneca Indian Nation. The Oneida Nation and all other Indian tribes in New York State have the capacity to sue in its courts by virtue of New York Indian Law §§ 5 and 11a, later enacted.

As originally passed § 5 read as follows:

"§ 5. Actions in state courts

Any demand or right of action, jurisdiction of which is not conferred upon a peacemakers' court, may be prosecuted and enforced in any court of the state, the same as if all the parties thereto were citizens."

In 1902 the Commissioners of the Land Office in New York State issued an opinion signed by the New York State Attorney General based on this section, 1902 Opinions of the Attorney General, p. 400, which stated in part as to Indian Law § 5 (p. 401):

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[10] This Court by denying certiorari in *St. Regis* v. *State*, 5 N Y 2d 24 (1958), cert. den. 359 U. S. 910, rehearing den. 359 U. S. 1015 (1959), another case where the New York Court of Appeals held that Indian tribes had capacity to sue but denied relief on other grounds, upheld the rights of New York State's Courts to assume jurisdiction in Indian matters.

"This provision of law last quoted [Indian Law § 5] gives to individual Indians the right of maintaining in the Courts of Record of this State, actions of ejectment, and other proceedings for the recovery of real estate, the same as citizens enjoy, and your committee therefore advise that your honorable board has no jurisdiction in the premises."

By section 671 of the Laws of 1953, Indian Law § 5 was clarified to read as follows:

"§ 5. Actions in state courts

Any action or special proceeding between Indians or between one or more Indians and any other person or persons may be prosecuted and enforced in any court of the state to the same extent as provided by law for other actions and special proceedings."

By this amendment the Indians were given the right to sue to the same extent that other citizens might sue. By New York Indian Law § 11-a (Laws of 1958, chap. 400, effective April 7, 1958), there was further clarification of the right of an Indian *nation* to sue. This law reads as follows:

"§ 11-a. Recovering possession of reservation land

In addition to any other remedy provided by this chapter or by any other law, the council, chiefs, trustees or headmen constituting the governing body of any nation, tribe or band of Indians may in the name and on behalf of such nation, tribe or band, maintain any action or proceeding to recover the possession of lands of such nation, tribe or band unlawfully occupied by others and for damages resulting from such occupation."

Before the Governor signed the bill which became Chapter 400 of the Laws of 1958 (§ 11-a), he received memos from his counsel and the Comptroller of the State of New

York. These memos are included now in the billjacket[11] for this law. Both memos state the bill if enacted would grant the Indians the privilege to sue in their tribal names in any action involving the recovery of or damage for reservation lands.

The main difference between the amended Indian Law § 5 and Indian Law § 11-a is that § 11-a included the "council, chiefs, trustees or headmen constituting the governing body of any nation, tribe or band" in those permitted to sue while the amended § 5 only used the term "Indians".

Petitioners note section 11-a in their brief (at page 17), stating that it must be construed with 25 U. S. C. A. 233. Section 233, which is entitled "Jurisdiction of New York State courts in civil actions" provides that the courts of New York State shall have jurisdiction in civil actions and proceedings affecting Indians or Indians and others to the same extent that they have jurisdiction in other civil actions and proceedings. It contains a statement that nothing contained in the statute shall be construed as "conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952".[12]

Section 11-a was not passed at about the same time as 25 U. S. C. A. 233 as petitioners contend. It was the

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[11] The billjacket in New York State is the Governor's file containing all memoranda sent to him at the time a bill is before him for signature.

[12] It should be noted that damages sought here were for the period from January 1, 1968 to December 31, 1969. The complaint's prayer for "such other relief" could only be for the period subsequent to that complaint. Thus, even under 25 U. S. C. A. 233, New York State has jurisdiction in the instant matter.

amended Indian Law § 5 which was enacted at about that time (1953). Section 11-a was enacted five years later in 1958.

There was a Memorandum to the Governor contained in the 1953 billjacket for the amended § 5, signed by Nathaniel L. Goldstein, the then Attorney General of the State of New York, which contained the following:

> "The bills will not take away any jurisdction [sic] from the peacemakers courts, but will give the State courts concurrent jurisdiction. This step is authorized by Congress, if such authority was needed by its Act of September 13, 1950 (64 Stat. 845, 25 U. S. C. § 233)."

The New York State Legislature by amended § 5 did not limit the actions which could be brought by Indians to those arising after September 13, 1952. Neither did § 11-a contain such a limitation. By clear language both §§ 5 and 11-a remove any doubt that Indian nations have a right to sue in New York State courts regardless of when the cause of action accrued.

Thus, while 25 U. S. C. A. 233 states that it does confer jurisdiction on New York State courts in matters which accrued prior to September 13, 1952, New York's own statutes, Indian Law §§ 5 and 11-a, gave the Indians and Indian Nations of the State capacity to sue irrespective of the date of the accrual of their cause of action, including those accruing prior to September 13, 1952 and also those which accrued thereafter.

In their brief, petitioners rely greatly on *United States* v. *Forness, supra,* 125 F. 2d 928 (2d Cir.), cert. den. 316 U. S. 694 (1942). The Congressional Record, August 14, 1950, containing portions of the debate on the bill which because 25 U. S. C. A. 233 has a statement by Representative O'Sullivan of Nebraska, an opponent of the bill, that

the bill was being enacted to overcome *U. S.* v. *Forness,* Mr. O'Sullivan said:

> "This decision rendered by the circuit court of appeals in the case of *United States* v. *Forness* (125 Fed. 2d 928), decided in 1942, upset the general theory of the New York State lawyers and in substance held clearly that the claims and rights of the Indians were established clearly by treaties, and that a treaty, like the gentleman from New York [Mr. REED] has stated, along with the Constitution, is the supreme law of the land.
>
> Then immediately these bills resembling S. 192, began to come into being. Since the year 1943 in about every session of the Congress bills like this S. 192, or similar bills were introduced but not one of them got by the scrutinizing eye of the Congress.
>
> The sponsors of such bills, it appears to me, are great believers in the old blurb, 'If at first you don't succeed, try, try again.'"

The bill, however, was passed and whatever adverse effects *United States* v. *Forness, supra,* might have had on the jurisdiction of New York courts over the Indians was removed.

It follows therefore that the petitioners herein had capacity to sue in New York State.

D. Assuming petitioners have a concurrent right to sue in the Federal and State courts, Federal courts should exercise the doctrine of abstention since any decision made either in the Federal or State courts would involve an interpretation of the New York State Statute of Limitations.

In any event §§ 5 and 11-a of the New York State Indian Law gave the Indians the capacity to sue in State courts so that they have a forum. Capacity to sue does not mean that there is no defense to their actions. The Statute of Limitations is a potential defense to their cause of action here. This, however, is no reason why they should be given a right to sue in the Federal courts and certainly the same Statute of Limitations would, if a bar to an action in the State courts, also be one in the Federal courts. See *Seneca Nations* v. *Christy,* 162 U. S. 283, *supra.*

This Court held in *Seneca* that there was no Federal question. In that case the New York Court of Appeals held that the Seneca Nation had the capacity to sue. Since the statute granting them this right limited it to the same extent as other people might sue, the Senecas were barred by the New York State Statute of Limitations just as any other litigant would be under similar circumstances. Here, too, both sections 5 and 11a of the New York State Indian Law contain limitations similar to that in the *Seneca* case. Therefore, the New York State Statute of Limitations would have to be considered. Since this is a purely New York question and, at most, Federal courts would have concurrent jurisdiction in this case, it is a proper one for Federal courts to invoke the doctrine of abstention and permit New York State courts to decide their own law. *Harrison* v. *NAACP,* 360 U. S. 167 (1959). In that case this Court said (pp. 176-177):

> "This now well-established procedure is aimed at the avoidance of unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system. To minimize the possibility of such interference a 'scrupulous regard for the rightful independence of state governments . . . should at all times actuate the federal courts,' *Matthews* v. *Rodgers*, 284 U. S. 521, 525, as their 'contribution . . . in furthering the harmonious relation between state and federal authority . . . .' *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496, 501. In the service of this doctrine, which this Court has applied in many different contexts, no principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them. See, *e.g.*, *Railroad Comm'n*, v. *Pullman Co.*, *supra*; *Chicago* v. *Fieldcrest Dairies, Inc.*, 316 U. S. 168; *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101; *American Federation of Labor* v. *Watson*, 327 U. S. 582; *Shipman* v. *DuPre*, 339 U. S. 321; *Albertson* v. *Millard*, 345 U. S. 242; *Government & Civic Employees* v. *Windsor*, 353 U. S. 364. This principle does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise; it serves the policy of comity inherent in the doctrine of abstention; and it spares the federal courts of unnecessary constitutional adjudication."

See, also, *Reetz* v. *Bozanich*, 397 U. S. 82 (1970).

It follows, therefore, that even if the Federal courts have concurrent jurisdiction, this is a proper case to exercise the doctrine of abstention.

CONCLUSION

The Order and Judgment of the court below should be affirmed.

Dated: August 14, 1973.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for State of New York
Amicus Curiae

RUTH KESSLER TOCH
Solicitor General of the State
of New York

JEREMIAH JOCHNOWITZ
Assistant Attorney General of the State
of New York

APPENDIX

Legislative Reports

Calendar No. 1473

89TH CONGRESS
2d Session

SENATE

REPORT
No. 1507

PERMITTING INDIAN TRIBES TO MAINTAIN CIVIL ACTIONS IN FEDERAL DISTRICT COURTS WITHOUT REGARD TO $10,000 LIMITATION

AUGUST 24, 1966.—Ordered to be printed

Mr. BURDICK, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 1356]

The Committee on the Judiciary, to which was referred the bill (S. 1356) to amend title 28, United States Code, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

AMENDMENTS

1. Page 1, line 4, strike "1360" and insert in lieu thereof "1361".

2. Page 1, line 5, strike "1361" and insert in lieu thereof "1362".

3. Page 1, line 6, strike "1361" and insert in lieu thereof "1362".

4. Page 1, after line 11, insert a new section 2:

SEC. 2. The Chapter Analysis of Chapter 85 of title 28 of the United States Code is amended by adding at the end thereof the following new item:

"§ 1362. Indian tribes."

PURPOSE OF AMENDMENTS

The previous section number assigned, 1361, is already in use, and the proposed section must be renumbered as 1362.

PURPOSE OF BILL

The purpose of the bill as amended is to permit Indian tribes to bring civil actions arising under the Constitution, treaties, and laws of the United States, without regard to the $10,000 limitation, and accordingly amends chapter 85, title 28, United States Code, by adding a new section.

STATEMENT

The Department of the Interior and the Judicial Conference of the United States have recommended that this bill pass. The Department of Justice declines to take a position on the bill, observing that it is a matter of policy upon which it is not appropriate for the Department to take a position. The Department of Justice points out, however, that there is no reason to believe that the number of cases which might result from the expansion of jurisdiction would be very large.

At hearings on this bill held by the Subcommittee on Improvements in Judicial Machinery, Senator Quentin N.

Burdick, author of the bill, testified in its behalf. The Senator's statement was substantially confirmed by Mr. Richmond Allen, Associate Solicitor in charge of Indian affairs for the Department of the Interior, and by Marvin Sonosky, Esq., an attorney speaking on behalf of some half-dozen Indian tribes. In substance, the proponents of this bill indicate that the jurisdictional limitation works an especial hardship on Indian tribes. In many instances claims arise under special treaties between the United States and the tribes, but because of the limitation the matter cannot be litigated in Federal courts. As an example, several parcels of land may be claimed by the tribes, each of the parcels being valued at under $10,000, even though the aggregate constitutes more than $10,000. However, these claims may not be added together for the purpose of meeting the jurisdictional amount, and the tribes are denied a Federal forum.

There is great hesitancy on the part of tribes to use State courts. This reluctance is founded partially on the traditional fear that tribes have had of the States in which their reservations are situated. Additionally, the Federal courts have more expertise in deciding questions involving treaties with the Federal Government, as well as interpreting the relevant body of Federal law that has developed over the years.

Currently, the right of the Attorney General of the United States to bring civil actions on behalf of tribes without regard to jurisdictional amount, a power conferred on him by special statutes, is insufficient in those cases wherein the interest of the Federal Government as guardian of the Indian tribes and as Federal sovereign conflict, in which case the Attorney General will decline to bring the action.

The proposed legislation will remedy these defects by making it possible for the Indian tribes to seek redress using their own resources and attorneys.

After a study of all of the foregoing the committee is of the opinion that this legislation is meritorious, and recommends that the bill S. 1356, as amended, be considered favorably.

Attached hereto and made a part hereof are the reports of the Department of the Interior, the Department of Justice, and the Judicial Conference of the United States.

U. S. DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
Washington, D. C., December 22, 1965.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U. S. Senate, Washington, D. C.

DEAR SENATOR EASTLAND: This responds to your request for a report on S. 1356, a bill to amend the Judicial Code to permit Indian tribes to maintain civil actions in Federal district courts without regard to the $10,000 limitation, and for other purposes.

We recommend that the bill be enacted.

The bill removes the $10,000 jurisdictional limitation upon civil litigation in the U. S. district courts by Indian tribes when the matter in controversy arises under the Constitution, laws, or treaties of the United States.

The Judicial Conference has endorsed the bill on the grounds that (1) it presents no difficulty of judicial ad-

ministration, and (2) it is in line with recently enacted statutes conferring Federal question jurisdiction without regard to the amount of money involved. We concur in that view.

In addition, it is particularly appropriate to remove the $10,000 limitation with respect to litigation involving tribal lands that are or were held by the United States in trust for the tribe, or by the tribe subject to a restriction against, alienation imposed by the United States. The issues involved are Federal issues and the tribes should not be required to conduct the litigation in the State courts.

It should be noted that the United States as trustee can initiate the litigation in the Federal courts, and often does so. Occasionally, however, the U. S. attorney declines to bring an action, and the tribes should then have access to the Federal courts through their own attorneys.

The new section added to the title 28 of the United States Code should be section 1362 rather than section 1361.

We also suggest that the bill should add the new section 1362 to the table of contents for chapter 85 that precedes section 1331.

The Bureau of the Budget has advised that there is no objection to the presentation of this report from the standpoint of the administration's program.

Sincerely yours,

HARRY R. ANDERSON,
Assistant Secretary of the Interior.

ADMINISTRATIVE OFFICE OF THE U. S. COURTS,
SUPREME COURT BUILDING,
Washington, D. C., October 1, 1965.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U. S. Senate, Washington, D. C.

DEAR SENATOR EASTLAND: This is in further reply to your request of March 11, 1965, for the views of the Judicial Conference of the United States on S. 1356, a bill to amend the Judicial Code to permit Indian tribes to maintain civil actions in Federal district courts without regard to the $10,000 limitation, and for other purposes.

At its recent session on September 22-23, 1965, the Judicial Conference voted to approve this legislation. The Conference believes that the elimination of the $10,000 jurisdictional limitation upon civil litigation of Indian tribes would present no difficulty of judicial administration and would be in line with the more recently enacted statutes conferring Federal question jurisdiction which do not contain a monetary limitation.

It should be noted that the proposed section 1361 of title 28 of S. 1356 should be numbered 1362 as the previous number is already in use.

Sincerely,

WILLIAM E. FOLEY,
Deputy Director.

U. S. DEPARTMENT OF JUSTICE
OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D. C., March 4, 1966.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U. S. Senate, Washington, D. C.

DEAR SENATOR: This is in response to your request for the views of the Department of Justice on S. 1356, a bill to amend the Judicial Code to permit Indian tribes to maintain civil actions in Federal district courts without regard to the $10,000 limitation, and for other purposes.

Under existing law the district courts have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States (28 U. S. C. 1331[a]). The $10,000 jurisdictional amount is, of course, not applicable to actions brought in the name of the United States to enforce rights of Indian tribes arising under the Constitution, laws, or treaties of the United States (28 U. S. C. 1345). The bill would amend the Judicial Code by adding a new section under which the district courts would be vested with original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

The effect of the bill would be to remove insofar as actions brought by Indian tribes are concerned, the $10,000 limitation provided in section 1331(a) of title 28 and thus permit them to maintain actions in the U S. courts without

any limitation on the amount in controversy, where the case arises under the Constitution, laws, or treaties of the United States. One of the purposes of the bill apparently is to overcome the effect of the decision in the case of *Yoder* v. *Assiniboine and Sioux Tribes,* 339 F. 2d 360 (1964) which held that the Federal courts did not have jurisdiction of an action brought by the Indian tribes involving oil and gas well spacing on tribal lands because the tribes failed to show that the jurisdictional amount of $10,000 was involved.

As indicated above the *Yoder* case involved the power of a State to control oil and gas well spacing on Indian lands. Other suits which might be brought in the Federal courts under the bill would include actions to quiet title to land claimed by Indian tribes, including actions to set aside patents where it is alleged the patents infringe upon rights claimed by the tribes under the Constitution, laws, or treaties of the United States and actions for the protection of powers of tribal self-government. While an accurate estimate cannot be made of the number of cases which might result from the enactment of the bill, there is no reason to believe the number would be large.

Whether the bill should be enacted involves questions of policy on which the Department of Justice prefers to make no recommendation. However, if the bill is to receive favorable consideration it is suggested that since there presently is a section 1361 of title 28, United States Code (Public Law 87-748; 76 Stat. 744) the bill should be amended by substituting "1361" for "1360" on line 4 and by substituting "1362" for "1361" on line 5 and again on line 6 of the bill.

The Bureau of the Budget has advised that there is no objection to the submission of this report from the standpoint of the administration's program.

Sincerely,

RAMSEY CLARK,
Deputy Attorney General.

CHANGES IN EXISTING LAW

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

CHAPTER 85, TITLE 28, UNITED STATES CODE

§ 1361. • • •

"*§ 1362. Indian tribes.*

The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

HOUSE OF REPRESENTATIVES

89TH CONGRESS
2d Session

REPORT
No. 2040

AMENDING THE JUDICIAL CODE TO PERMIT INDIAN TRIBES TO MAINTAIN CIVIL ACTIONS IN FEDERAL DISTRICT COURTS WITHOUT REGARD TO THE $10,000 LIMITATION, AND FOR OTHER PURPOSES

SEPTEMBER 12, 1966.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. MCCLORY, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 1356]

The Committee on the Judiciary, to whom was referred the bill (S. 1356) to amend the Judicial Code to permit Indian tribes to maintain civil actions in Federal district courts without regard to the $10,000 limitation, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

Legislative Reports

PURPOSE

The purpose of the proposed legislation is to provide that the district courts are to have original jurisdiction of all civil actions brought by Indian tribes or bands wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States. These civil actions would therefore be permitted without regard to the $10,000 jurisdictional amount provided in section 1331(a) of title 28, when brought by an Indian tribe or band under the authority of the new section added by the bill.

STATEMENT

The Department of the Interior in its report to the Senate committee recommended the enactment of the bill. The Department of Justice made no recommendation as to the bill, and the administrative office of the U. S. court in behalf of the Judicial Conference stated that the Judicial Conference in its September 1965 session voted to approve the legislation.

By adding a new section 1362 to chapter 85 of title 28 of the United States Code, the bill would add language to that title making it possible for an Indian tribe or band having a governing body recognized by the Secretary of the Interior to bring actions in a district court where the matter in controversy arises under the Constitution, laws, or treaties of the United States. In providing for original jurisdiction of all civil actions of this type, the bill has the effect of removing the $10,000 jurisdictional requirement which presently applies as to such actions by reason of the provisions of section 1331 of the same chapter of title

28. The district courts now have jurisdiction over cases presenting Federal questions brought by the tribes when the amount in dispute exceeds $10,000. Enactment of this bill would merely authorize the additional jurisdiction of the court over those cases where the tribes are not able to establish that the amount in controversy exceeds that amount. In its report to the Senate Committee, the Department of the Interior specifically pointed out that the issues involved in cases involving tribal lands that either are held in trust or were so held by the United States or are held by the tribe subject to restriction against alienation imposed by the United States are Federal issues. The Department therefore observed that particularly as to this class of cases it is appropriate that the actions be brought in a U. S. district court. In its statement to the Senate committee, that Department referred to the unique governmental status of Indian tribes that the unique relationship which exists between them and the Federal Government. This is a relationship often affected by treaties and the Department of the Interior indicated that a tribe's desire to have a Federal forum for matters based upon Federal questions is justified.

The report of the Department of Justice referred to the case of *Yoder* v. *Assiniboine and Sioux Tribes of Fort Peck Indian Reservation, Mont.* (339 F. 2d 360 (1964)), and the committee feels that this case serves to exemplify the difficulties encountered by Indian tribes in connection with the type of litigation which would be governed by the new section 1362 added to the law by this bill. In that case, the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Mont., sought to enjoin the enforcement of a State order attempting to pool the lands owned

by the tribes with the lands of another to form a "spacing unit" in connection with the drilling of an oil and gas well. The tribes were successful in the district court. However, on appeal to the U. S. Court of Appeals for the Ninth Circuit, the case was reversed on jurisdictional grounds because of the difficulty in establishing the amount in controversy as more than $10,000. The incongruity of this situation is pointed up by the fact that, traditionally the matters concerning Indian lands under trust allotments fall within the exclusive control of the Federal Government. The judicial determination of controversies concerning such lands commonly is committed to the Federal courts. *Minnesota* v. *United States,* 305 U. S. 382 (1938).

The committee feels that there is another factor which is relevant in this situation and serves to emphasize the justification for enactment of this bill. The United States as trustee can initiate litigation involving issues identical to those which would be presented in cases brought under the new section. The enactment of this bill would provide for U. S. district court jurisdiction in those cases where the U. S. attorney declines to bring an action and the tribe elects to bring the action. As is observed in the Department of the Interior report the tribes would then have access to the Federal courts through their own attorneys. It can therefore be seen that the bill provides the means whereby the tribes are assured of the same judicial determination whether the action is brought in their behalf by the Government or by their own attorneys. There is a large body of Federal law which states the relationship, obligations and duties which exists between the United States and the Indian tribes. The Federal forum is therefore appropriate for litigation involving such issues.

In his statement before the Senate committee, the representative of the Department of Interior stated that it was the Department's view that the creation of the jurisdiction contemplated by the bill will not add appreciably to the burdens of the Federal courts. As has been noted, these courts now entertain cases brought by the Federal Government to vindicate tribal rights without regard to the amount in controversy. Further, they now entertain cases presenting Federal questions brought by the tribes when the amount in dispute exceeds $10,000. This bill would therefore authorize the addition of only those cases, which the Justice Department stated would probably not be large in number, where the tribes have not been able to show that the amount in controvsery exceeds $10,000, and the Government for some reason does not want to prosecute the case in behalf of the tribe. The Judicial Conference in commenting on this type of case has stated that the jurisdiction contemplated by the bill would present no difficulty of judicial administration.

In view of the matters discussed above, and the favorable position of the Department of the Interior and the Judicial Conference on the United States, the committee recommends that the bill be considered favorably.

Attached hereto and made a part hereof are the reports to the Senate committee of the Department of the Interior, the Department of Justice, and the Judicial Conference of the United States:

Legislative Reports

U. S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D. C., December 22, 1965.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U. S. Senate, Washington, D. C.

DEAR SENATOR EASTLAND: This responds to your request for a report on S. 1356, a bill to amend the Judicial Code to permit Indian tribes to maintain civil actions in Federal district courts without regard to the $10,000 limitation, and for other purposes.

We recommend that the bill be enacted.

The bill removes the $10,000 jurisdictional limitation upon civil litigation in the U. S. district courts by Indian tribes when the matter in controversy arises under the Constitution, laws, or treaties of the United States.

The Judicial Conference has endorsed the bill on the grounds that (1) it presents no difficulty of judicial administration and (2) it is in line with recently enacted statutes conferring Federal question jurisdiction without regard to the amount of money involved. We concur in that view.

In addition, it is particularly appropriate to remove the $10,000 limitation with respect to litigation involving tribal lands that are or were held by the United States in trust for the tribe, or by the tribe subject to a restriction against, alienation imposed by the United States. The issues involved are Federal issues and the tribes should not be required to conduct the litigation in the State courts.

It should be noted that the United States as trustee can initiate the litigation in the Federal courts, and often does so. Occasionally, however, the U. S. attorney declines to bring an action, and the tribes should then have access to the Federal courts through their own attorneys.

The new section added to title 28 of the United States Code should be section 1362 rather than section 1361.

We also suggest that the bill should add the new section 1362 to the table of contents for chapter 85 that precedes section 1331.

The Bureau of the Budget has advised that there is no objection to the presentation of this report from the standpoint of the administration's program.

Sincerely yours,

HARRY R. ANDERSON,
Assistant Secretary of the Interior.

ADMINISTRATIVE OFFICE OF THE U. S. COURTS,
SUPREME COURT BUILDING,
Washington, D. C., October 1, 1965.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U. S. Senate, Washington, D. C.

DEAR SENATOR EASTLAND: This is in further reply to request of March 11, 1965, for the views of the Judicial Conference of the United States on S. 1356, a bill to amend the Judicial Code to permit Indian tribes to maintain civil actions in Federal district courts without regard to the $10,000 limitation, and for other purposes.

At its recent session on September 22-23, 1965, the Judicial Conference voted to approve this legislation. The Conference believes that the elimination of the $10,000 jurisdictional limitation upon civil litigation of Indian tribes, would present no difficulty of judicial administration and would be in line with the more recently enacted statutes conferring Federal question jurisdiction which do not contain a monetary limitation.

It should be noted that the proposed section 1361 of title 28 of S. 1356 should be numbered 1362 as the previous number is already in use.

Sincerely,

WILLIAM E. FOLEY,
Deputy Director.

U. S. DEPARTMENT OF JUSTICE,
OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D. C., March 4, 1966.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U. S. Senate, Washington, D. C.

DEAR SENATOR: This is in response to your request for the views of the Department of Justice on S. 1356, a bill to amend the Judicial Code to permit Indian tribes to maintain civil actions in Federal district courts without regard to the $10,000 limitation, and for other purposes.

Under existing law the district courts have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States (28 U. S. C. 1331(a)). The $10,000 jurisdictional amount is, of course, not applicable to actions brought in the name of the United States to enforce rights of Indian tribes arising under the Constitution, laws or treaties of the United States (28 U. S. C. 1345). The bill would amend the Judicial Code by adding a new section under which the district courts would be vested with original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

The effect of the bill would be to remove insofar as actions brought by Indian tribes are concerned, the $10,000 limitation provided in section 1331(a) of title 28 and thus

permit them to maintain actions in the U. S. courts without any limitation on the amount in controversy, where the case arises under the Constitution, laws, or treaties of the United States. One of the purposes of the bill apparently is to overcome the effect of the decision in the case of *Yoder* v. *Assiniboine and Sioux Tribes*, 339 F. 2d 360 (1964) which held that the Federal courts did not have jurisdiction of an action brought by the Indian tribes involving oil and gas well spacing on tribal lands because the tribes failed to show that the jurisdictional amount of $10,000 was involved.

As indicated above, the *Yoder* case involved the power of a State to control oil and gas well spacing on Indian lands. Other suits which might be brought in the Federal courts under the bill would include actions to quiet title to land claimed by Indian tribes, including actions to set aside patents where it is alleged the patents infringe upon rights claimed by the tribes under the Constitution, laws, or treaties of the United States and actions for the protection of powers of tribal self-government. While an accurate estimate cannot be made of the number of cases which might result from the enactment of the bill, there is no reason to believe the number would be large.

Whether the bill should be enacted involves questions of policy on which the Department of Justice prefers to make no recommendation. However, if the bill is to receive favorable consideration it is suggested that since there presently is a section 1361 of title 28. United States Code (Public Law 87—748; 76 Stat. 744) the bill should be amended

by substituting "1361" for "1360" on line 4 and by substituting "1362" for "1361" on line 5 and again on line 6 of the bill.

The Bureau of the Budget has advised that there is no objection to the submission of this report from the standpoint of the administration's program.

Sincerely,

RAMSEY CLARK,
Deputy Attorney General.

Legislative Reports

CHANGES IN EXISTING LAW

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 28, UNITED STATES CODE

CHAPTER 85.—DISTRICT COURTS; JURISDICTION

Sec.

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1362. Indian tribes

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"§ *1362. Indian tribes*

"The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."